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No. 82-1772

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents urge this Court to fashion several substantial loopholes in the special statutory procedures Congress has provided for the administrative and judicial review of the millions of Social Security claims filed each year. Their submission, however, is flatly inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and its progeny, with the text and legislative history of the Social Security Act, and with the consistent administrative interpretation and implementation of 42 U.S.C. (& Supp. V) 405 since it was enacted in 1939.

The exhaustion requirements and limitations on judicial review that respondents seek to avoid were imposed by Congress and the Secretary to further the purposes of the Social Security program as a whole. These provisions promote efficiency, fairness, and uniformity of decisionmaking[1]; they fulfill the responsibility of the Secretary to inquire fully into each claim[2]; and they minimize

[1] See Gov't Br. 18, 23-30, 34-37, *Heckler* v. *Day*, No. 82-1371.

[2] *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 10-11 & n.12; *id.* at 1-2 (Brennan, J., concurring); *id.* at 1 (Marshall, J., concurring and dissenting). See also *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971).

the burden on the courts and prevent premature judicial interference into matters entrusted to the Secretary by assuring an opportunity for the agency to correct its own errors, apply its experience and expertise, and compile a record adequate for judicial review.[3]

The arguments respondents seek to raise in this action outside the special statutory review procedures all can be raised on judicial review under 42 U.S.C. (Supp. V) 405(g) of a "final decision" denying their claims for benefits for BCBR surgery. Moreover, the Secretary's procedures accommodate the very interest respondents advance in this case—the desire of some claimants to expedite judicial review—by permitting the ALJ hearing and Appeals Council stages to be expedited or dispensed with entirely if the claimant and the Secretary agree that these steps are unnecessary. Respondents, however, did not attempt to invoke those provisions.[4] Thus, even putting legal obstacles to one side, there is no policy justification for the judicially fashioned exceptions respondents seek.

Respondents' position also presents enormous practical difficulties. The efficient review of millions of Social Security claims each year depends on the ability of the Secretary and the courts to enforce governing procedural rules easily and uniformly in *all* cases, without the need to litigate concerning their wisdom and applicability in individual cases. Acceptance of respondents' arguments for circumventing the statutory review procedures would substantially disrupt the orderly administrative and judicial review of Social Security claims and accelerate the recent proliferation of extensive and wasteful litigation in the lower courts on threshold questions of jurisdiction and exhaustion of administrative remedies.

1. Respondents' broad submission that the district court had jurisdiction in this case under one or another of several theories (Resp. Br. 12-29) is directly contrary

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[3] *Weinberger* v. *Salfi*, 422 U.S. at 765.

[4] See Gov't Br. 4-5, 39-44; S. Doc. 10 (Pt. 3), 77th Cong., 1st Sess. 43 (1941).

to the text of the Social Security Act, which expressly precludes jurisdiction over this case on any basis.[5] Congress has provided that a person may obtain judicial review of the administrative denial of a claim for benefits under Part A of the Medicare Program only if the Secretary first has rendered a "final decision" on the claim "after [a] hearing," and only if the amount in controversy is $1000 or more. 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g). To underscore that this is the exclusive means for obtaining judicial review, Congress provided in 42 U.S.C. 405(h) that "[n]o findings of fact or decision of the Secretary shall be reviewed by any * * * tribunal * * * except as herein provided"—*i.e.*, except as provided in 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g). And Congress further provided in 42 U.S.C. 405(h) that "[n]o action" to recover on any claim arising under the Social Security Act may be brought under Section 41 of Title 28 of the United States Code, which, at the time 42 U.S.C. 405(h) was enacted, contained all of the general grants of jurisdiction to federal district courts. *Salfi*, 422 U.S. at 756 n.3.

It is difficult to see how Congress could more clearly have expressed its intent to channel all challenges to a preliminary decision by the Secretary denying a claim—whether those challenges are constitutional, statutory, regulatory, procedural, or evidentiary in nature—through the special statutory review procedure in 42 U.S.C. 1395ff (see *Salfi*, 422 U.S. at 762, 765-767) and to require that the claimant complete all of the administrative steps of that procedure before seeking judicial review. "[A]bsent a clearly expressed legislative intention to the contrary, [this statutory] language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102,

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[5] We confine our discussion in the text to the claims of respondents Holmes, Webster-Zieber and Vescio. They are the only three respondents who actually underwent BCBR surgery and filed applications for benefits under the Medicare Program for that surgery, and they therefore are the only three who satisfied the "nonwaivable" requirement for jurisdiction under 42 U.S.C. 405(g). See Gov't Br. 37 n.26; *Weinberger* v. *Salfi*, 422 U.S. at 764; *Mathews* v. *Eldridge*, 424 U.S. 319, 328-329 (1976).

108 (1980). Respondents point to no indication whatever of a "legislative intention to the contrary," and in fact the limited legislative history of 42 U.S.C. 405 indicates that Congress meant exactly what it said.[6] The text of the Act therefore conclusively refutes respondents' contentions that the district court had jurisdiction in this case under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) even though they had not completed all of the administrative steps of the statutory review procedure, and that they could in any event separate out certain "procedural" issues relating to the interlocutory decisions denying their claims and obtain immediate judicial review of those issues in an action brought under 28 U.S.C. (Supp. V) 1331 or 28 U.S.C. 1361.

It also is significant that when Congress has intended to permit judicial review on a particular question of law or the validity of a regulation involved in a claim for benefits before the entire claim has been disposed of by a "final decision" at the administrative level, it has expressly so specified in the Social Security Act itself. Under 42 U.S.C. 1395*oo*, a provider of services under Medicare may obtain review of its reimbursement claim by the Provider Reimbursement Review Board in HHS, and the Board's "final decision" in turn is subject to judicial review. See Gov't Br. 5-6. Congress amended this Section in 1980 to permit a provider to obtain immediate judicial review of a "question of law or regulations" without first obtaining a "final decision" by the Board

[6] Both committee reports, in explaining the preclusion of review in 42 U.S.C. 405(h), state that "there shall be no review of the Board's decisions by any person, tribunal, or governmental agency except as provided in subsection (g)." S. Rep. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. 728, 76th Cong., 1st Sess. 43-44 (1939). The reports discuss the "final decision" requirement in 42 U.S.C. 405(g) essentially by paraphrasing the statutory language. Like Section 405(g) itself, however, they refer to the possibility that the validity of a regulation affecting procedural matters might be at issue on judicial review, without suggesting that review of the regulation itself or the procedural issues it addresses would be available prior to the rendering of a final decision on an individual claim for benefits. S. Rep. 734, at 52; H.R. Rep. 728, at 43.

on the entire reimbursement claim if the Board determines that it is without authority to resolve the legal issue. 42 U.S.C. (Supp. V) 1395*oo*(f)(1). The legislative history shows that Congress fully understood that without this statutory exception, the Board would be required to render a final decision on the entire claim before the provider could obtain judicial review, even though the Board would be bound by the regulation or provision of law involved. H.R. Rep. 96-1167, 96th Cong., 2d Sess. 394 (1980). Congress did not, however, create an exception to the identical "final decision" requirement in 42 U.S.C. (Supp. V) 405(g) and 42 U.S.C. 1395ff(b) to permit a beneficiary to obtain interlocutory judicial review on a question of law or regulations, as respondents seek to do here. "In the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose" such a right. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).[7]

2. Contrary to respondents' and amici's apparent contentions (Resp. Br. 14 n.12; Am. Br. 27-28, 38-39), the consistent administrative interpretation and implementation of Section 405 firmly supports the construction its plain language requires. The Social Security Board's January 1940 report regarding the manner in which 42 U.S.C. 405 would be implemented (see *Salfi*, 422 U.S. at

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[7] Moreover, when Congress enacted the exception to the "final decision" requirement in 42 U.S.C. (Supp. V) 1395*oo*(f)(1), it provided for expedited judicial review *within* the special statutory review procedure, not in a separate action under 28 U.S.C. (Supp. V) 1331 or 28 U.S.C. 1361, as respondents urge here (Resp. Br. 19-29). And even this exception mandates a form of exhaustion by requiring that the claimant first present the question to the Board so that the Board can determine whether the provision of law or regulation in fact is involved in the case and is beyond its authority to resolve. It therefore is untenable to suppose, as respondents also urge, that Congress intended to permit a beneficiary to obtain immediate judicial review under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) of an interlocutory decision denying a claim without even presenting the matter to an ALJ or the Appeals Council. Compare Gov't Br. 43-44.

759-760 n.6; *id.* at 790-792 (Brennan, J., dissenting)) made clear that the Appeals Council would be an essential step in the administrative process; that only a decision by the Appeals Council would constitute the Board's "final verdict" on a claim; and that the Board construed the Act to provide that a decision would not be "final" for purposes of judicial review until completion of any proceedings the Secretary deemed necessary after a hearing. S. Doc. 10 (Pt. 3), 77th Cong., 1st Sess. 38-39, 51-53 (1941). Accordingly, regulations implementing 42 U.S.C. 405 made clear from the outset that judicial review could be obtained only after the claimant had sought review from the Appeals Council. 5 Fed. Reg. 4169, 4171-4174 (1940) (adopting 20 C.F.R. 403.706(c), 403.708(g), 403.709(*l*), and 403.710(e)).

Consistent with this practice, the regulations in effect when Congress enacted the Medicare Program in 1966 likewise made clear that a decision denying a claim would be subject to judicial review under 42 U.S.C. 405(g) only after the hearing required by 42 U.S.C. 405(b) and Appeals Council review. 20 C.F.R. 404.908, 404.916, 404.940 and 404.951 (1966).[8] Against this background, Congress's specification in 42 U.S.C. 1395ff(b) that a Medicare Part A beneficiary is entitled to a hearing "as provided in section 405(b)" and judicial review of the final decision after that hearing "as provided in section 405(g)" must be viewed as a ratification of the exhaustion requirement in the then-existing regulations and approval of its application to Part A Medicare claims. *Haig* v. *Agee*, 453 U.S. 280, 297-299 (1981); *Lorillard* v. *Pons*,

[8] Thus, contrary to respondents' contention (Resp. Br. 14 n.12), we do not argue that the particular regulation promulgated in 1980 stating that a final decision will have been rendered only after Appeals Council review (20 C.F.R. 404.900(a)(5) (1979)) set forth a *new* definition of finality. That provision did not make a substantive change. See 44 Fed. Reg. 20176, 20178 (1979). The Court recognized in *Salfi* that under the prior regulations, "the finality required for judicial review [was] achieved only after the further steps of a hearing before an administrative law judge and, possibly, consideration by the Appeals Council" (422 U.S. at 765).

434 U.S. 575, 580-581 (1978). Furthermore, Congress plainly did not contemplate that the exhaustion requirement could be circumvented by bringing an action under 28 U.S.C. 1331 or 1361, as respondents urge (Resp. Br. 19-29). The legislative history of the Medicare Act makes clear that "[*i*]*t is intended that the remedies provided by* [*the statutory*] *review procedures shall be exclusive.*" *United States* v. *Erika, Inc.*, 456 U.S. 201, 209 n.11 (1982) (quoting S. Rep. 404, 89th Cong., 1st Sess. 54-55 (1965) (emphasis added by the Court)).

3. In the face of these overwhelming obstacles, respondents nevertheless contend (Resp. Br. 12-16) that they were entitled to immediate judicial review under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) of the denial of their claims at the reconsideration level because the October 1980 HCFA ruling barring payment for BCBR surgery indicated that further exhaustion of their administrative remedies would be futile and that " 'the Secretary will treat as final any denial of benefits for the BCBR surgery' " (Resp. Br. 16 (quoting Pet. App. 8a)). This contention is plainly incorrect, both factually and legally.

Contrary to respondents' assertion, the Secretary in fact has not "treat[ed] as final" any denial of benefits for BCBR at the reconsideration stage. She has continued to provide for the ALJ and Appeals Council review that the Act and her own regulations require. Moreover, respondents once again ignore the fact that the formal HCFA ruling they challenge does not even apply to the only three respondents who filed a claim for benefits, because all three had the surgery before the effective date of that ruling. Gov't Br. 13, 45. The ALJ's thorough consideration of pre-October 1980 BCBR claims without regard to the 1980 HCFA ruling and the Appeals Council's subsequent decision to grant review of such claims on the merits (Gov't Br. 13, 14 n.8) renders frivolous respondents' assertion that the 1980 ruling indicated that exhaustion of administrative remedies would be futile.

The more fundamental flaw in respondents' argument, however, is their assumption that a court may excuse the exhaustion of administrative remedies required by 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) based on its own assessment that exhaustion would be futile. This Court explicitly held in *Salfi* that although the statutory scheme does not bar the *Secretary* from determining that full internal exhaustion is not necessary in order for her to deem an otherwise interlocutory decision to be administratively "final" for purposes of judicial review (422 U.S. at 766-767), "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (*id.* at 767 (emphasis added)). See also *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983), slip op. 8 (Rehnquist, Circuit Justice).

The Court reiterated this holding in *Mathews* v. *Eldridge*, *supra*, observing that "under § 405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibilty for the integrity of the administrative program is his." 424 U.S. at 330.[9] Similarly, the Court stated in *Mathews* v. *Diaz*, 426 U.S. 67, 76 (1976) (emphasis added), that it had "held in *Salfi* that the *Secretary* could waive the exhaus-

[9] Respondents and amici rely (Resp. Br. 19 n.15; Am. Br. 23, 31 n.6) on a passage in *Eldridge* in which the Court observed that although the Secretary had authority to determine the timing and content of the procedures that provided for termination of benefits before a hearing was held, "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." 424 U.S. at 330. This passage, however, addressed the question whether the claimant had satisfied the "nonwaivable" requirement of submitting a claim to the Secretary. See 424 U.S. at 329-330. The Court's discussion of the "waivable" exhaustion requirement, at issue here, commenced with the *succeeding* paragraph, in which, as noted in the text, the Court reiterated the *Salfi* holding that the power to determine when finality has occurred rests with the Secretary. 424 U.S. at 330. The quoted passage therefore lends no support to respondents' assertion that a court may excuse exhaustion based on its own conclusion that exhaustion would be futile.

tion requirements which [42 U.S.C. 405(g)] contemplates and that he had done so in that case." The Court noted that in *Salfi* it had interpreted the Secretary's failure to challenge the sufficiency of the allegations of exhaustion "as a determination *by the Secretary* that exhaustion would have been futile and deferred to his judgment that the only issue presented was the constitutionality of a provision of the Social Security Act" (426 U.S. at 76 (emphasis added)). The Court explicitly based its holding in *Diaz* on "[t]he same reasoning" (*ibid.*). Thus, contrary to respondents' assertion (Resp. Br. 12-16; see also Am. Br. 21-25, 27-31, 36-39), no decision of this Court suggests that a court may excuse exhaustion based on its own conclusion that exhaustion would be futile.

4. Contrary to respondents' and amici's contention (Resp. Br. 12-15; Am. Br. 21-23, 27-29), it also is clear that the Secretary cannot be held in this case to have "waived" the need for full exhaustion of administrative remedies under the rationale of *Salfi* and *Diaz*. Those cases both involved the unique circumstances of a challenge to the constitutionality of a provision of the Social Security Act itself, a matter that was beyond the competence of the Secretary to decide. Accord, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 641 n.8 (1975); *Schweiker* v. *Wilson*, 450 U.S. 221, 227-228 (1981). This case, by contrast, involves questions arising *under* the Act: whether BCBR surgery is a covered medical procedure and whether the Secretary was required by the doctrine of offensive nonmutual collateral estoppel to award respondents benefits. The first determination is expressly committed by statute to the Secretary (42 U.S.C. 1395ff(a)), and the role collateral estoppel should play in making that determination is a procedural question that likewise is for the Secretary to resolve in the first instance (42 U.S.C. 405(a) and 1395ff(a)). Gov't Br. 48-49. As even the dissenting Justices in *Salfi* recognized, where an individual is "claiming that the Social Security Act *itself* provides him certain rights," he "'*must* exhaust administrative remedies, and the District Court is limited to *review* of the Secretary's de-

cision, in the manner prescribed by § 405(g)." 422 U.S. at 790 (emphasis in original). A court therefore cannot deem the Secretary to have dispensed with the complete exhaustion that is required by her own regulations where the issues in dispute are within her competence to decide.[10]

Moreover, here, unlike in *Salfi* and *Diaz*, there has been no particularized stipulation or agreement by the Secretary that the very applications filed by the individual claimants before the court will be denied or that the Secretary and respondents agree on the proper resolution of all issues of fact and statutory interpretation relating to those applications. Gov't Br. 42. Respondents therefore are reduced to relying on the October 1980

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[10] Because the Secretary now has promulgated regulations that establish a procedure for dispensing with administrative review beyond the reconsideration stage where only the constitutionality of a statutory provision remains in issue (see Gov't Br. 39-41), a court could not now find a waiver of exhaustion by the Secretary even in the circumstances presented in *Salfi* and *Diaz* if the claimant had not availed himself of those procedures.

Respondents suggest (Resp. Br. 14 n.12) that this Court in *Diaz* "implicitly" rejected the position that the Secretary's regulations must control. This suggestion is without merit. It would be startling indeed if the Secretary could not establish procedures for deciding when she will make such a waiver, and nothing in the opinion or background of *Diaz* suggests that she may not. The Secretary informed the Court in *Diaz* that regulations governing claims involving only constitutional issues were being considered in September 1975 (Gov't Supp. Br. 5 n.2 (No. 73-1046, 1975 Term)), but the Secretary did not suggest that those regulations would control in *Diaz* itself if they subsequently were promulgated. In their Supplemental Reply Brief in *Diaz*, the appellees noted (at 4 & n.1) that the Secretary was considering promulgation of the regulations and did not challenge his authority to do so. The appellees simply argued that the Secretary already had committed himself to "finality" in the case of appellee Espinosa's claim by his stipulations in district court, and the Court disposed of the exhaustion question in *Diaz* on that narrow ground. 426 U.S. at 76-77 & n.11. Accordingly, although the Secretary's special expediting regulations were promulgated in November 1975, before *Diaz* was reargued or decided, the Court had no occasion to consider their validity.

HCFA ruling, not the circumstances of their own individual claims, in support of their contention that the Secretary has "waived" exhaustion here. But to excuse exhaustion of administrative remedies on individual claims on the basis of the Secretary's issuance of a ruling of *general applicability* would tear the limited waiver rationale of *Salfi* and *Diaz* from its roots and transform it into a potentially limitless doctrine under which a court may excuse compliance with the statutorily mandated exhaustion requirement in whole categories of cases based on its belief that the Secretary has taken a "final position" on a particular issue and would be unlikely to change her view on that issue in the course of further review of an individual claim for benefits. Indeed, respondents and amici candidly acknowledge that that is precisely their goal in this litigation. See Resp. Br. 16; Am. Br. 31-35. See, *e.g.*, *Kuehner* v. *Schweiker*, 717 F.2d 813, 817-818 (3d Cir. 1983).[11] This result would radically restructure the Social Security claims adjudication process, for "there is no decision of this Court that has interpreted the Secretary's announcement of her interpretation of a Social Security statute as a waiver of the exhaustion requirement." *Heckler* v. *Lopez*, No. A-145 (Sept. 9, 1983), slip op. 8 (Rehnquist, Circuit Justice). There are, in addition, at least five major flaws in this submission:

First, the Secretary in 1980 explicitly *rejected* a proposal that the special procedure for expediting judicial review of constitutional questions be expanded to include claims in which the validity of a regulation is challenged, concluding that exhaustion in such cases "serves a clearly useful purpose, since it avoids time-consuming and often expensive judicial intervention in cases where the agency has authority to address the claimant's complaint." 45 Fed. Reg. 52079 (1980). A finding that the Secretary

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[11] Moreover, the logic of their position would appear to apply irrespective of the manner by which the Secretary expressed her allegedly "final position"—whether in a brief filed in another case, an interpretative ruling, a press release, or congressional testimony.

has waived exhaustion would fly in the face of this determination.

Second, for a court to dispense with exhaustion on the basis of a ruling or statement that it believes represents the Secretary's "final position" on a particular issue would be contrary to this Court's holding in *Salfi* that whether exhaustion would be futile and should be excused is for the Secretary, not the courts, to determine. Indeed, in *Salfi* itself, the challenged statutory provision perforce constituted the Secretary's "final position" on whether benefits could be paid, but the Court did not excuse exhaustion on that broad basis.

Third, respondents disregard the text and purposes of 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g). Those sections do not authorize judicial review of the Secretary's "final position" on legal issues or of the "polic[ies] or practice[s] of the Secretary" as such (Am. Br. 31). They authorize judicial review only of the Secretary's "final decision" regarding "the rights of any individual applying for a payment" (42 U.S.C. 405(b)). A court may review the Secretary's legal positions and practices only as an incident to its consideration of the Secretary's final denial of a specific claim for benefits.

Fourth, the policies supporting the statutory requirement that the claimant exhaust his administrative remedies and obtain a single "final decision" disposing of *all* issues bearing on the claim for benefits before seeking judicial review clearly are not rendered inapplicable merely because the Secretary has promulgated a regulation or taken a position on *one* of those issues. As in every adjudication, it remains necessary for the Secretary to apply all relevant law and policy of general applicability to the circumstances of the particular case and to render a final administrative judgment on the claim. Even where it might appear that a regulation would absolutely bar the payment of benefits, exhaustion ensures that the ALJ and Appeals Council will have an opportunity to determine that the regulation actually applies

to the particular claim. In this very case, for example, the ALJ determined that the regulation respondents challenge did *not* apply to their claims. Exhaustion also enables the ALJ and Appeals Council to determine whether the claim should be allowed on other grounds or is invalid for other reasons, and to resolve any factual or legal issues unrelated to the challenged regulation or policy that may be lurking in the case. *Salfi*, 422 U.S. at 762; *Eldridge*, 424 U.S. at 331-332. In this way, exhaustion may obviate the need for judicial review altogether or at least narrow the issues to be presented, and also may provide the court with a complete record and the benefit of the ALJ's and Appeals Council's reasoning so that any issues remaining in dispute are brought more sharply into focus. See *Heckler* v. *Lopez*, slip op. 9 (Rehnquist, Circuit Justice); *Smith* v. *Schweiker*, 709 F.2d 777, 780-781 (2d Cir. 1983).

Fifth, the interlocutory and piecemeal judicial review respondents and amici advocate would substantially disrupt the administrative process and impose a significant additional burden on the courts. For example, if the claimant abandoned the administrative process when he sought interlocutory judicial review, would his right of administrative review be reinstated despite his procedural default if the court subsequently dismissed the suit for failure to exhaust? And if the claimant requested an ALJ hearing *in addition* to seeking immediate judicial review, as respondents did here, should the ALJ or Appeals Council stay further action pending completion of judicial proceedings? To do so would stand the exhaustion doctrine on its head, and the result would be to delay administrative proceedings and perhaps *postpone* the payment of benefits to a person who would have been found by the ALJ or Appeals Council to be entitled to receive them. See, *e.g.*, *Heckler* v. *Lopez*, slip op. 9 (Rehnquist, Circuit Justice); *Smith* v. *Schweiker*, 709 F.2d at 778, 780-781. Yet if the ALJ and Appeals Council do not stay their hands, the result would be duplicative proceedings and a waste of judicial and administrative re-

sources. Moreover, no matter what the agency does administratively, there would be extensive and wasteful litigation in court on the threshold questions of exhaustion and jurisdiction. And even if the claimant prevailed on interlocutory judicial review of a particular issue involved in his claim, a second round of judicial proceedings might well be required if the Secretary subsequently denied the claim on other grounds. All of these difficulties would be avoided if the courts and claimants simply adhered to the straightforward and entirely reasonable statutory exhaustion requirement.[12]

5. Respondents plainly err in contending (Resp. Br. 17) that the decision in *Mathews* v. *Eldridge*, permitting immediate judicial review of what the Court termed a "collateral" issue without requiring full exhaustion of administrative remedies, supports a finding that the district court had jurisdiction in this case. See Gov't Br. 46-48. In *Eldridge*, the Court relied on three factors: (1) the constitutional question at issue was "entirely collateral to [the] substantive claim of entitlement" (424 U.S. at 330); (2) the very nature of the asserted constitutional right to a *pre*deprivation hearing was such that full relief could not be obtained at a *post*deprivation

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[12] The potential difficulties are illustrated by the extreme to which the Third Circuit carried respondents' theory in *Kuehner* v. *Schweiker*, *supra*. There the court held that the allegations in the complaint, filed on behalf of a class of thousands of beneficiaries who had not exhausted their administrative remedies, that the Secretary in fact had adopted "fixed policies" on a number of issues must be assumed to be true for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and that the plaintiffs were entitled to an opportunity to prove those allegations. 717 F.2d at 815, 818. We submit, however, that rather than conducting a trial on whether the Secretary actually has expressed a "final" view on an issue and disrupting the administrative review of thousands of claims in the process, the court should simply have awaited the Secretary's "final decision" on an individual benefit claim, which would express her final position, as applied to that claim, on any "issue" that ultimately played a part in her decision. The Solicitor General has determined that a petition for a writ of certiorari will be filed in *Kuehner*.

hearing (*id.* at 330-331); and (3) denying the substantive claim for other reasons or awarding retroactive benefits under other provisions would not answer the asserted right (*id.* at 331-332). This case is completely different. Respondents' challenge to the HCFA rulings barring payment for BCBR and their assertion that payment must be allowed under the doctrine of collateral estoppel are integral elements of their claim of entitlement to benefits; they are not even remotely "collateral" issues. Furthermore, these issues can be fully reviewed in the ordinary course of further administrative and judicial review and can be sufficiently remedied or answered by an award of benefits on these or other grounds or a denial of benefits for independent reasons.

The inapplicability here of the narrow "collateral issue" exception recognized in *Eldridge* also is confirmed by the parallel the Court drew in that case between 42 U.S.C. 405(g) and 28 U.S.C. 1291, which likewise provides for review only of "final decisions." See 424 U.S. at 331 n.11, citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). It is of course firmly established that 28 U.S.C. 1291 prohibits piecemeal review and ordinarily permits an appeal only from a final judgment disposing of all issues in the case. See, *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940). However, this Court has recognized a narrow exception to the final judgment rule under 28 U.S.C. 1291 for "collateral orders." To qualify, such an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). The pretermination hearing issue involved in *Eldridge* satisfied these criteria,[13] but the issues respondents raise clearly do not. The Secretary did not "conclusively determine" the collateral estoppel question, because respondents were free to press

[13] Accord, *Califano* v. *Yamasaki*, 442 U.S. 682, 703 (1979); cf. *Heckler* v. *Day*, No. 82-1371 (argued Dec. 5, 1983).

that argument before the ALJ and Appeals Council (see Gov't Br. 49). And neither that issue nor respondents' attack on the Secretary's BCBR ruling is at all "separate from the merits of the action" or "effectively unreviewable" on judicial review of a "final judgment" by the Secretary.[14]

6. Finally, respondents contend (Resp. Br. 19-29) that even if the district court did not have jurisdiction under 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g) because they failed to exhaust their administrative remedies, they nevertheless could obtain immediate judicial review under 28 U.S.C. (Supp. V) 1331 or 28 U.S.C. 1361 of what they label "procedural" issues involved in the Secretary's interlocutory decisions denying their claims. This contention, if accepted, would totally undermine the purposes Congress sought to accomplish by establishing the special statutory review procedure in 42 U.S.C. 1395ff and 405. Congress recognized as much in 1939, when it enacted 42 U.S.C. 405 and expressly precluded such circumvention.

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[14] Respondents argue (Resp. Br. 17) that exhaustion of administrative remedies should be excused because their "interest in prompt judicial review is predicated upon a vital interest in restoring their ability to function as viable human beings and often upon life or death concerns." This suggestion is simply wrong. The only respondents who could file an application for benefits and therefore raise the exhaustion issue are the three who already underwent the BCBR surgery. Thus, in this as in any other Medicare case, any time that elapses while the applications for reimbursement are reviewed administratively could not cause postponement of the medical services. Claimants of course do not receive benefits while their claims are being considered, but Congress clearly intended that consequence when it provided for the consideration of Medicare claims according to the then-existing procedures established under 42 U.S.C. 405(b) and (g) for Title II claims. See also 42 U.S.C. (Supp. V) 421(d) and 42 U.S.C. (Supp. V) 1383(c)(1) and (3). Just as a court of appeals cannot excuse compliance with the jurisdictional "final decision" requirement in 28 U.S.C. 1291 based on its own view of a party's interest in obtaining immediate review, a district court cannot on that basis excuse compliance with the "final decision" and corresponding exhaustion requirement in 42 U.S.C. 1395ff(b) and 42 U.S.C. (Supp. V) 405(g).

The second sentence of 42 U.S.C. 405(h) provides that no decision of the Secretary shall be subject to review by any "tribunal * * * except as herein provided"—*i.e.*, except pursuant to 42 U.S.C. 405(g)—and the legislative history shows that Congress meant exactly what it said. See page 7 and note 6, *supra*. This broad language clearly encompasses mandamus actions under 28 U.S.C. 1361 as well as suits under 28 U.S.C. (Supp. V) 1331.[15] In addition, the third sentence of Section 405(g) provides that "[n]o action" to recover on any claim under the Act shall be brought "under section 41 of Title 28" of the United States Code. See Gov't Br. 33 n.24. The Court held in *Salfi* that this sentence bars suits under 28 U.S.C. 1331, and respondents' efforts to avoid that holding (Resp. Br. 26-29), which amici do not join, have been fully answered in our opening brief (Gov't Br. 20-32). Moreover, contrary to respondents' contention (Resp. Br. 20-22), the third sentence of Section 405(h) also clearly precludes the exercise of mandamus jurisdiction.

As this Court observed in *Salfi*, "[a]t the time § 405(h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that Title's grants of jurisdiction to United States district courts, save for special-purpose jurisdictional grants" (422 U.S. at 756

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[15] This conclusion is reinforced by the fact that the first and second sentences of Section 405(h) were explicitly patterned after the statutory provision in effect in 1939 that precluded all judicial review of veterans benefits determinations, which expressly barred review by mandamus (Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 9; *Lynch* v. *United States*, 292 U.S. 571, 587 (1934)). See H.R. Doc. 110, 76th Cong., 1st Sess. 13 (1939); S. Doc. 10, at 13; *Social Security: Hearings Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 2288 (1939); cf. S. Rep. 734, at 51. Like 42 U.S.C. 405(h), several of the versions of the veterans benefits preclusion in effect over the years have not specifically referred to mandamus (see *Johnson* v. *Robison*, 415 U.S. 361, 368-369 nn.9-10 (1974)), but Congress did not intend that the absence of such a reference would result in a less sweeping bar. See S. Rep. 2198, 76th Cong., 3d Sess. 11-12 (1940); 86 Cong. Rec. 13491 (1940).

n.3). In the 1948 recodification, these general grants of jurisdiction were carried forward en bloc in what is now Chapter 85 of Title 28, which, like its predecessor, is entitled: "District Courts; Jurisdiction." When Congress enacted the general grant of mandamus jurisdiction in 1962, it specified that the new mandamus provision would be included within "chapter 85 of title 28 of the United States Code" (Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744). By this enactment, Congress deliberately placed 28 U.S.C. 1361 within the chapter that is the present-day codification of the prior Section 41 of Title 28, and therefore squarely within the "sweeping" preclusion of review in the third sentence of 42 U.S.C. 405(h). *Salfi*, 422 U.S. at 757.[16] This construction of the third sentence of Section 405(h) is fully consistent with the congressional purpose of channeling review of all procedural and substantive issues relating to a claim for benefits through the special statutory review procedure in 42 U.S.C. (Supp. V) 405(g) and ensuring that "the Board is protected against the possibility of reversals of its decisions in separate actions filed for th[is] purpose" (S. Doc. 10, at 39). There is no difference between mandamus and federal question jurisdiction insofar as accomplishment of that purpose is concerned.

Nor is there any justification for construing Section 405(h) in a manner contrary to its language and purpose because of a perceived need to preserve mandamus jurisdiction for issues that may arise in connection with a claim for benefits for which jurisdiction under 42 U.S.C. (Supp. V) 405(g) is unavailable. Congress obviously believed and intended that the self-contained scheme in 42 U.S.C. 405(g) would furnish a fully adequate means for obtaining judicial review, and this Court's re-

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[16] Indeed, in *Salfi* itself the district court's jurisdiction was invoked under 28 U.S.C. 1361 as well as 28 U.S.C. 1331 (J.A. 7 (No. 74-214, 1974 Term)), and yet the Court ordered dismissal of the complaint insofar as it concerned class members who failed to satisfy the jurisdictional requirements of 42 U.S.C. 405(g), on the ground that "[o]ther sources of jurisdiction [are] foreclosed by § 405(h)" (422 U.S. at 764).

peated experience with Section 405(g) in *Salfi* and its progeny has shown that Congress's expectation was well founded. Where Congress has not precluded judicial review of certain Social Security claims altogether (see *United States* v. *Erika, Inc., supra*), this Court has made clear that the statutory finality requirement in 42 U.S.C. (Supp. V) 405(g) will "be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered" (*Mathews* v. *Eldridge*, 424 U.S. at 331 n.11). For this reason, a construction of the second and third sentences of Section 405(h) that forecloses the exercise of mandamus jurisdiction also is supported by established principles that bar mandamus relief where there is another adequate remedy. See *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-544 (1937); Gov't Br. 35.[17]

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[17] Respondents' and amici's argument that mandamus jurisdiction is not barred by 42 U.S.C. 405(h) is insubstantial. It proceeds as follows (Resp. Br. 21-22; Am. Br. 43-46): (1) prior to the enactment of Section 405 in 1939, the district court for the District of Columbia could have exercised common law mandamus jurisdiction over the Board; (2) the enactment of Section 405(h) in 1939 did not prevent the exercise of common law mandamus because that section only bars the exercise of statutory jurisdiction; and (3) 28 U.S.C. 1361 simply authorizes all district courts to exercise the jurisdiction that the district court in the District of Columbia previously possessed (see *Stafford* v. *Briggs*, 444 U.S. 527, 534-535 (1980)), and therefore is likewise not within the reach of Section 405(h). The first of these premises may or may not be correct, but it is irrelevant because the second and third premises are seriously flawed.

The committee reports on the 1939 statute in which Section 405 was enacted in fact do express some uncertainty on the question of judicial review, noting that the then-present provisions of the Social Security Act "do not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the Board." S. Rep. 734, at 52; H.R. Rep. 728, at 43. The very purpose of the 1939 amendments, however, was to "specify" such a remedy in the statute itself and to preclude all others, including both the statutory jurisdictional bases encompassed by the third sentence of Section 405(h) and any other form of judicial review by

In any event, mandamus relief is clearly unavailable with respect to the only argument respondents seek to raise under 28 U.S.C. 1361 (see Resp. Br. 23-25): that the Secretary was required to award benefits to them because ALJs and the Appeals Council previously had awarded benefits to *other* claimants for BCBR surgery. That argument, which was frivolous to begin with, now is foreclosed by this Court's decision in *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), barring the use of nonmutual collateral estoppel against the government. But even if this argument had merit, there would be no reason, despite the constitutional label respondents attach to it, to excuse them from presenting the argument to the ALJ and Appeals Council. See Gov't Br. 49; see also *Heckler* v. *Lopez*, slip op. 8 (Rehnquist, Circuit Justice); slip op. 6 (Stevens, J., dissenting).

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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Solicitor General

FEBRUARY 1984

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any "tribunal," as provided in the second sentence. The latter preclusion necessarily applied to common law mandamus. See page 17, *supra*. Moreover, an action under the newly enacted 42 U.S.C. 405(g) was required to be brought in the judicial district where the claimant resided and thus could not be brought in the District of Columbia unless the claimant resided there. It would have been inconsistent with this statutory scheme that dispersed Social Security cases throughout the country to permit a claimant to obtain judicial review of a decision of the Board (or certain issues relating to such a decision) under common law mandamus jurisdiction in the District of Columbia. And in any event, as explained in the text, Congress enacted the general grant of mandamus jurisdiction in 1962 in a manner that clearly brought it within the sweep of the third sentence of Section 405(h) as well.

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